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Dicta Editorial Board

# DICTA

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# DICTA

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DICTA

Vol. XXI OCTOBER, 1944 No. 10

# DICTAPHUN

## Announcement of First Award (New Series)

A distinguishing feature of this column in other years was its prize contests. We recall one of the most successful was confined to members of the Supreme Court. Under the rules, the justice who, in a given period, used the largest number of split infinitives received an award. The winner proved to be an amiable Democrat who, in addition, galloped over the finish line with a dangling participle in his teeth.

We return to our custom by reviving an unsolved mystery of many years standing. It came to our mind while we were reading the weekly column of our esteemed, respected, revered and admired contemporary, Richard Peete, in *The Rocky Mountain Herald,* the journal which so deftly confuses politics and poetry. Dick's column, you know, is labeled "Anecdotes of the Jealous Mistress," and bears a sub-line, perhaps a slogan, "The law is a jealous mistress."

Some twenty years ago Henry *Wolcott* Toll was president of the bar association, whether state, local or national we do not remember. We know it was not the Lawyers Guild. A literatus of his standing naturally thought it desirable to publish a magazine, and not simply, as you were thinking, because his name would be on the masthead. So he started one, and most unhappily he named it *The Jealous Mistress.* For this led inquiring minds to delve into the history of the phrase "the law is a jealous mistress." All the Wolcotts combined couldn't furnish the answer and the Tolls failed *en masse.* Shafroth and Grant were no help. Such authorities as Dean Pound and his equally erudite sister, Dean Pound, went out swinging. *Nobody* knew and nobody, we believe, has found out since.

We offer, therefore, as our first contest (new series) the intriguing problem: Who first said "the law is a jealous mistress"?

The prize: An indulgence of one year for the sin of failing to read and contribute to this column.

## Would Radar Help?

A Denver real estate firm publishes at odd intervals a journal describing their offerings. The name of the firm will be mentioned if and when we get their abstract business. Anyway, in the current issue, they solicit bids on the purchase of a hotel located in a community "* * * forty miles N. E. of Colorado Springs and sixty miles S. W. of Denver."

You may comment, if you wish, that that is about as close as this column comes to humor. Our answer is that that is about as close as you come to understanding our humor.

## Help Us Out On This One

*The Colorado Graphic*, which states it has given "Sixty-two Years of Satisfactory Service," which is sixty-two years more than we have, will satisfy us if it will only tell us what is meant by this comment in the issue of August 19 last:

> "Dicta for August was late coming to our desk and we were wondering why until we found that, like many forgotten things do at election season, DICTAPHUN had been demanding attention; and everything had to wait while those men settled the argument. At any rate, there it is and you'd do well to keep it for you might want to protest the election on the strength of some of the remarks in it."

## I Cannot Attend His Funeral But I Am In Favor Of It

A Denver lawyer who used to be Public Administrator apparently has more time for reading than formerly. He favors us with an item clipped from a paper nobody would read unless he had nothing else to do. The item has to do with a divine who married the relict of a departed colleague and, paraphrased ever so slightly, reads as follows:

> "Ever a friend of the deceased, he was well prepared to step into the shoes so ably filled by his predecessor, the fragrance of whose journey into eternity still lingers sadly, sweetly, among those who knew him well."

## Thanks To The Yanks

Our appeal for contributions has not overtaxed the facilities of our postman. Nevertheless, the response has been gratifying and we trust will continue so. Remember our rule: If it is not too good your name will be mentioned. Carle Whitehead who, we fear, will never live long enough to frank his letters, spent 3c for a stamp and some fraction of his office's overhead sending us this gem of judicial writing by a judge who holds office during good behavior:

> "Though we have seen much of the liberality of Nevada practice, we assume that even in that forward looking jurisdiction parties to a cause of divorce may not litigate by day and copulate by night, *inter sese et pendente lite.*"

For the full text consult *Holt v. Holt*, 77 F. (2d) 538. And if you are puzzled by the heading on this paragraph, to-wit, "Thanks to the Yanks," it is a tribute to our contributors. They yank an item out of some publication, send it to us, and we print it.

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Finally, are you aware that the word pun is a contraction of pundigrion?

# The Office of Dependency Benefits*

CAPTAIN JOSEPH E. HENRY†

Congress has passed laws providing for the security of the dependents of those in the service through payment of monthly benefits. I will outline some of the provisions of these Acts as they are administered for the families of Army men and women.

The major soldiers' benefits are the family allowance and the Class E allotment-of-pay. They are administered for the Army by the War Department Office of Dependency Benefits, an activity of the Army Service Forces in Newark, N. J.

The family allowance, a purely war-time benefit, is provided under the Servicemen's Dependents Allowance Act of 1942 as amended. It consists of a deduction from the soldier's pay and an added contribution by the Government. Only those in the enlisted grades, and aviation cadets are eligible—men and women in these grades, however, constitute over 92 per cent of the entire Army.

The voluntary Class E allotment-of-pay is authorized under laws which have been in existence since 1899. All Army men—from privates to generals—may authorize this allotment-of-pay for their dependents, or to an insurance company for payment of premiums on their commercial life insurance policies, or to a bank for their own or a dependent's bank account. It is an assignment entirely from the Army men's own pay. No Government contribution is added.

Many soldiers who apply for family allowances also authorize Class E allotment-of-pay to provide additional income for their families. Both benefits are disbursed by the ODB in the form of regular monthly payments.

The ODB now administers more than seven million active accounts —including over four and a half million family allowances and two and three-quarter million allotments-of-pay—on behalf of some twelve million dependents of Army men and women. These people live in all forty-eight states and in fifty-four foreign countries as well. Disbursements are being made currently at the rate of nearly four billion dollars a year. So you can get some idea of the tremendous Army-wide job the ODB is doing.

In addition to the millions of monthly checks disbursed, our huge war agency handles a volume of daily mail which equals that of a medium-sized city. To date, the ODB has received and dispatched a total of 69,756,026 pieces of mail—exclusive of the 88,042,000 checks dis-

*An address before the Law Club, June 26, 1944.

†Of the Regional Field Investigation Office, Office of Dependency Benefits, at Denver, Colorado.

bursed. This mail includes applications, documents submitted in evidence, notice of changes in address, and notice of other changes of status, such as the birth of a child whose name must be added to a family allowance; the marriage of a soldier, adding a wife; the addition of a dependent parent, brother, or sister, or the death of a payee. The ODB has processed more than 4,500,000 such changes of status since it began operations.

When you realize that this agency has been in operation for only about two years; that it was organized from scratch on a scale providing ample machinery for the phenomenally rapid expansion of its war-time operations, you begin to grasp the nature and scope of the tremendous task which has faced the Director and his forces of 9,000 officers and civilian employees. It is a task which required unusual foresight and judgment, as well as exceptional qualities of executive leadership. General Gilbert has these qualities. An outstanding organizer and administrator, he is geared for high-powered jobs. He visualizes them coming a long way ahead, and plans in advance an orderly precision which creates smooth functioning machinery.

That is why the ODB has been capable of administering a steadily increasing volume of family allowances and allotments-of-pay with the many changes involved and with the many problems that arise day by day.

The domestic problems which present themselves in connection with the administration of family benefits are a story in themselves. Because of them, the Director has been likened, very aptly, to a judge of an international court of domestic relations. Mr. Anthony has nothing on General Gilbert when it comes to untangling knotty domestic tangles —and deciding who is eligible for what—and how much!

If each soldier's family understood the complexity of the ODB's task; if they knew also that their family allowance application—or allotment-of-pay authorization was one of millions, they would have a better understanding of the time required to set up accounts and to "Get 'Em Paid!" "Get 'Em Paid!" by the way, is the working slogan of the ODB. That agency is working six days a week on two shifts and on all holidays, except Christmas, to live up to it.

The family allowance is the benefit in which new inductees are primarily interested. So we will discuss that in some detail.

The members of a soldier's family who are eligible for the family allowance include first of all, his wife and children—these are known as his class A dependents. A divorced or separated wife, to whom alimony is payable, also may receive this benefit, but payments to a divorced wife are limited by the amount of alimony decreed. In no case is the amount payable to a divorced wife more than $42—and if alimony is less, the monthly payment is less.

Class A dependents need prove only relationship to the soldier in order to establish claims to a family allowance.

Dependent parents, brothers and sisters who rely upon the soldier for *chief* support are considered class B-1 dependents and are paid on a scale somewhat comparable to that of his wife and children.

In a third class—known as Class B—are those dependent parents, brothers, and sisters who rely upon soldier for only a *substantial* part of their support. They will receive as a group only one amount, $37 monthly, regardless of the number of such dependents. This means that if the soldier has *one* such dependent, that one may receive $37 a month; if he has two, three or four—the entire group may receive only $37 a month.

All class B-1 and class B dependents must *prove* their dependency upon the soldier. They may not receive a family allowance simply because they are the parents, or brothers and sisters of the Army man or woman. Dependency certificates must be filled out and witnessed, stating the facts of their dependency.

Soldiers' dependents should keep in mind the fact that they must be dependent as claimed in these dependency certificates. Any acceptance of a family allowance by a person not entitled to it, with intent to defraud the Government, is unlawful and renders such a person liable to heavy fines and imprisonment.

Children, brothers and sisters, by the way, are eligible only if unmarried and under eighteen years of age. The exception would be such a dependent who is mentally or physically incapable of self-support. Documentary evidence must accompany the application. This consists primarily of certified copies of marriage and birth records. And I *do not* mean marriage licenses. These are not acceptable proof of marriage. There might be many a slip twixt the license and the ceremony.

While I am on the subject of documentary proof to substantiate claims for a family allowance, I might say a word about the work of my particular branch of the ODB—the Field Investigations Branch. It is our job to check on family allowance claims; to study documents which may bear evidence of irregularities: To see that those claiming dependency in a dependency certificate are, in fact, dependent as claimed, and to investigate those cases which bear evidence of intent to defraud.

In order to maintain the constant vigilance necessary to guide dependents who may not understand the law and to protect the Government at the same time, from those who would commit willful acts of fraud, the Field Investigations Branch has a network of regional offices like the one here in Denver to which I am assigned. They are located in key cities throughout the country.

Of the thousand of cases of illegal acceptance of family allowances investigated so far I am glad to say that the great majority involved

misunderstanding of the law rather than intent to defraud. Many parents, brothers or sisters, for example, believe that they are entitled to a family allowance simply because they have a son in the service—even though not actually dependent upon a soldier for support. In such cases, where dependency cannot be established, the family allowance payments are discontinued, and restitution requested, but there is no prosecution.

There have been a number of cases where intent to defraud was clearly shown, however. Such cases were turned over promptly to Federal Law enforcement agencies for prosecution and convictions have been obtained. Heavy sentences of fines and imprisonment have been imposed.

The primary offenders are women who have claimed more than one soldier as their husbands in order to receive family allowances. These have learned to their sorrow that you can't play crooked games with Uncle Sam's chips—and expect to win!

Soldiers who have claimed women as their wives, or other dependents, when the women were not in fact related to them as claimed, also have paid the price of their folly.

In the past year, the ODB's FIB has effected a net saving of about two million dollars in Government funds in the prevention of family allowance payments to those not entitled to them.

To avoid the confusion and misunderstanding which might lead to illegal acceptance of a family allowance by entirely innocent persons, the ODB urges all prospective inductees to get a copy of the Family Allowance Information Sheet and the information booklet known as FA-3. Both are available at any post or camp, or at any recruiting office or induction station. The booklet will explain in detail the requirements for eligibility and the rates paid. The information sheet gives the prospective soldier an idea of just exactly what information he will be asked to supply on the official application form. It has been prepared to guide those about to enter the service, in gathering facts about family dates, relationships, dependency, and in collecting required proof.

If prospective inductees fill out this information sheet ahead of time, and follow the instructions as to the evidence required in their particular cases, it will be a simple matter for them to apply for family allowances once they enter the Army. They must remember, of course, that this information sheet is not an official application—and cannot be sent in as such. It is for their guidance alone, in making preparations to file the official form.

Between the date of a soldier's induction and the time he reports for active duty, the inductee is given some time in which to settle his personal affairs at home. This would be a good time to gather his

family allowance data. Upon arrival at the Reception Center, he will be given ample opportunity to apply.

There is one important thing for every new soldier to remember—his Army serial number. That is his one positive identifying symbol in the Army. Both the soldier and his dependents should learn that number by heart. If his wife or mother finds it hard to remember figures, she should write down this all-important number and keep it always at hand. For purpose of applying for a family allowance or authorizing a Class E allotment-of-pay, that Army serial number is indispensable. For the ODB identifies cases by this number.

It is particularly important in connection with your family allowance. This Army serial number should be written on ALL documents a soldier or his family send in to the ODB. It is one thing which does not change and cannot be duplicated, although the soldier's name may be duplicated many times. There are 25,000 Smiths among the GIs who have ODB accounts, for example: 15,000 Browns and over 500 Robert Taylors—not to mention the Murphys and the Cohens!

But for every GI, there is only one Army serial number which is as distinctively his as his own personality.

So, when soldiers file their applications with their commanding officers, they should attach all documentary proof—and see that the Army serial number is clearly written on each document.

One more point. If a soldier applies *within fifteen days after he enters on active duty* in a pay status, his dependents may receive an "Initial" family allowance. Eligible for this are his wife and children, or other dependents who rely upon him for *chief* support.

This is a gift from Uncle Sam. None of it will come out of the soldier's Army pay. It couldn't, in fact, for he will not have earned a full month's pay by that time.

This "Initial" family allowance is sent to his family to help tide them over the weeks which must elapse between the time he applies for the family allowance and the date on which his account is authorized and the first check becomes due. The law provides that the regular monthly payments shall begin after the end of the month following the one in which application is filed and the "Initial" family allowance is payable—in other words, after the soldier has been in a pay status for a full calendar month. For example, if you should enter the Army this month, your primary dependents would receive an "Initial" family allowance immediately after your application had been filed with your commanding officer, provided you applied within 15 days after reporting for active duty in a pay status. The check would be mailed to your dependents directly from your camp. Your application would then be forwarded to the ODB and under normal procedure, the regular monthly

payments would be due after the end of next month—or in a period from four to seven weeks later.

Soldiers would be wise to pass on these facts to their dependents so that they may budget their initial family allowance accordingly.

If everybody understood the procedure for setting up and paying family allowance accounts, I am sure the ODB would receive fewer letters like the one from the Army wife out west who wrote testily:

"My husband was inducted last week and I haven't received any checks yet. Ship money or husband at once!"

The ODB cannot ship husbands back to their wives. But it can—and does "Get 'Em Paid!"

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## State Revenue Department Should Publish Rulings

BY WILLIAM R. NEWCOMB*

At a time when both the spirit of administrative reform is in the air and problems of taxation are increasingly critical it seems pertinent to call attention to a situation relating to both of these matters which should be of vital interest to all Colorado lawyers.

I write of the lack of publication of the findings of the Revenue Department for the State. As Colorado lawyers know, when either a protest of an assessment or a claim for refund is made, the taxpayer is granted a hearing before the Law Board of the Revenue Department. As a result of this hearing a Final Determination is put in written form and a copy thereof is sent to the taxpayer, either denying or granting his claim. This Determination is kept in the files of the taxpayer and in the files of the Revenue Department. No one else can be aware of it except by rumor passed about by word of mouth. This situation contains the seeds of two possible evils. First, there may be dozens or even hundreds of taxpayers in exactly the same position as a taxpayer who is fortunate enough to secure a refund, who are never informed of their rights. It is too much to expect, of course, that the Revenue Department will, of its own initiative, search the files in order to grant refunds. The burden is, as it always has been, upon the person claiming a right and a remedy. Yet, it must also be assumed that the Revenue Department is not interested in retaining funds to which, by its own determination in many cases, it is not entitled. The remedy for such a disturbing situation is to enable the taxpayer to be vigilant in the enforcement of his rights, by giving to him information concerning the Revenue Department's findings through publication and distribution of its Final Determinations.

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*Of Denver bar.

A second evil of this lack of publicity is the possibility of the Revenue Department's making conflicting decisions on the same facts according to the whim and caprice of its members. Published reports would eliminate the groping in the dark by those who appear before the Department as to what attitudes have been assumed in the past on the same or similar facts.

The element of secrecy cannot be considered a desirable one in any administrative agency. It is conducive to the atmosphere of the Star Chamber and, in the hands of less forthright and conscientious gentlemen than those who are now in the Revenue Department, could result in the gravest of injustices to the taxpayer. The cost of such publication cannot, of course, be considered as a material objection when fundamental rights are at stake. By the same token, the increased burden on the Revenue Department as a necessary consequence of the demands of an enlightened and vigilant class of taxpayers cannot be considered to be material.

It is true that at present appeals may be taken to the District Court and thence to the Supreme Court, which tends towards a uniformity of Determinations by the Revenue Department and to a small measure of publicity. But the uniformity is imposed only as to the infinitesimal number of cases which reach the Supreme Court, and the publicity is achieved only to the same extent.

It is not suggested that the Department publish in full its rulings and decisions so as to reveal information which taxpayers may not wish disclosed as to their incomes. However, a system of publication similar to that of the Cumulative Bulletins of the Federal Government would serve adequately to inform the public and still preserve anonymity.

A government of laws and not of men is the strongest guaranty for the maintenance of the democratic way of life. That fundamental principle would be furthered in the State of Colorado by the simple expedient of giving full publicity to the determinations of the Revenue Department. If the Bar Association of Colorado would take an active interest in this pressing need, and work to see the reform accomplished, it would be striking a hearty blow against the type of governmental machinery that allows despotism to flourish.

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## State Bar Plans Interesting Convention Program for Meeting on October 13-14 at Springs

With a program highlighted by addresses by Judge Manley O. Hudson, internationally known jurist, and Judge John B. Knox, judge of a federal district court and author of two best sellers, the annual convention of the Colorado Bar Association promises to be one of the best

in years. The meeting will be held at the Broadmoor Hotel in Colorado Springs on October 13 and 14, 1944.

Also featured on the program will be a series of addresses on the proposed changes in both the federal and state civil rules of procedure, and a symposium on practice and procedure before federal bureaus.

The District Judges Association, and the County Judges Association will hold conferences at the Broadmoor Hotel on October 12, 1944.

Reversing somewhat the program arrangement of previous years, the program committee, headed by Ben E. Sweet of Denver, has decided to precede the formal opening of the meeting with section and committee meetings. The District Attorneys' section will meet at 9:30 on Friday with E. M. Eagleton of Canon City presiding. The program for the section meeting, as arranged by James T. Burke of Denver, is as follows:

Governor John C. Vivian—"Paroles and Pardons"; H. Lawrence Hinkley, Deputy Attorney General—"Appeals in Criminal Cases"; Ralph L. Carr—"The New Criminal Code"; Representative of Staff Judge Advocate's Office A.A.F.W.T.T.C.—"Coordination of Civil and Military Authority"; Judge George A. Luxford—"The Judicial Point of View"; Thomas J. Morrissey, United States District Attorney—"Our Present Day Problems"; and Harry V. Childerston, Superintendent of Colorado State Industrial School—"Outline of School's Progress to Date."

At ten o'clock the water section will begin its meeting. Malcolm Lindsey of Denver, Chairman, presiding. Chief feature of interest on its schedule is "Consideration of Proposed Legislation to Be Presented to the Incoming Legislature."

The section on Probate, Real Estate and Trust Law will meet at ten o'clock on Friday. Its program will be devoted largely to a discussion of proposed changes in the probate law and a proposed trust law. The section will be presided over by H. Lawrence Hinkley of Sterling, Chairman.

Two important committee meetings are also scheduled for that morning. The Lawyers War Emergency Committee will hold a conference with the legal assistance officers of the various posts.

The Committee on Real Estate Standards will discuss the problems of providing for uniform standards and the methods of promulgating new ones. Edwin J. Wittleshofer of Denver, Chairman, is anxious that each local association have a delegate at this conference. The meeting will be open to all who desire to attend.

Among other groups meeting at this time will be the Junior Bar Section. According to Truman Stockton of Denver, Chairman, the annual election of officers will be held at that time.

The Friday luncheon will be in charge of the El Paso Bar Association, which will provide entertainment for this period. Following the luncheon gathering, the convention will be formally opened at two o'clock with the president's address. John E. Clark of Glenwood, president, will review briefly the year's activities and bring to the attention of the group problems of current interest to the bar. Edwin J. Wittleshofer of Denver, Chairman of the Committee, will then discuss the real estate standards and procedure for making them uniform.

The remainder of the afternoon will be devoted to a discussion of the proposed changes in the state and federal rules of civil procedure. G. Walter Bowman, Clerk of the Federal District Court, will discuss the amendments proposed by the Advisory Committee on rules for the United States Supreme Court in its draft of May, 1944. This draft proposes changes in 41 rules and suggests a new rule relating to condemnation proceedings. Thomas Kelley will explain the changes proposed by the Supreme Court Committee in the state rules of civil procedure.

On Friday evening Judge Manley O. Hudson will deliver the annual address. Judge Hudson, a justice of the Permanent Court of International Justice at The Hague, and outstanding authority on international law, will speak on the problem of settling upon the requisite judicial machinery for the maintenance of peace.

The Saturday morning session will center around a discussion of practice before federal bureaus. J. Glenn Donaldson will outline the opportunities for practice before the federal bureaus. Dexter Blount, regional attorney for the WPB, will discuss practice and procedure before that Board. Martin Kurasch, regional attorney for the WLB, will speak on procedure before that authority. The concluding address on the symposium will be given by Allen Moore, rationing attorney for OPA, who will discuss the American Bar Association's bill dealing with administrative procedure.

For those attending the Saturday afternoon luncheon will be the rare treat of listening to Thomas E. Munson of Sterling spinning some of his fine yarns about the times long ago.

On Saturday afternoon George Evans of the state income tax department will outline the changes brought about by the 1944 federal income tax—the so-called simplified tax law. The Weld County Bar Association will present a dramatic skit dealing with current problems of vast insignificance. The meeting will close with the election of officers.

The annual banquet will be held that evening. Judge John C. Knox will be the after-dinner speaker. Judge Knox has served on the federal bench since 1918. He is the author of "A Judge Comes of Age,"

and "Order in the Court" and is widely known as an entertaining and able speaker.

Convention rates for the meeting at the Broadmoor Hotel are:

| | |
|---|---|
| Single Rooms | $ 5.50 per day, European Plan |
| Double Rooms | 8.00 per day, European Plan |
| Lanai Suites, Two Persons | 14.00 per day, European Plan |
| Third person in room | 4.00 per day, European Plan |

To avoid interference with transportation facilities lawyers are urged to pool their automobiles and to avoid use of the trains if possible.

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## Denver Bar Association
### Committee Chairmen
### 1944-1945

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|---|---|
| *Legal Ethics and Grievances* | Frederick P. Cranston |
| *Legal Aid* | John E. Gorsuch |
| *Judiciary* | Robert G. Bosworth |
| *Legislative* | William E. Hutton |
| *Meetings and Entertainment* | Irving Hale, Jr. |
| *Membership* | Richard Tull |
| *Auditing* | Joseph C. Sampson |
| *Junior Bar* | Truman A. Stockton, Jr. |
| *Unlawful Practice* | Frank A. Wachob |
| *Municipal Code Revision* | Marmaduke B. Holt, Jr. |
| *Real Estate Title Standards* | Edwin J. Wittelshofer |
| *War Emergency* | W. D. Wright, Jr. |

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## Wanted

*By the Editors of Dicta—*

—From secretaries of local bar associations, reports of meetings, elections, and other stories of interest regarding the activities of their local associations.

—From the committees of the Colorado and the local bar associations, narrative stories of the activities of their committees.

—From the members of the Colorado bar, articles of interest regarding current legal problems, or other matters of interest to the bar generally. Such articles should be of general interest, not unduly documented by legal citations.

Your editors wish to make DICTA interesting to and readable by every member of the bar. We urge every member of the bar to send to us all items which you think will be of general interest to the bar. It is up to you to help us make DICTA the voice of the bars of Denver and Colorado.

AIRPORTS AND THE COURTS. By CHARLES S. RHYNE. National Institute of Municipal Law Officers, 730 Jackson Place, N. W., Washington 6, D. C., 1944. Pp. XIII, A-1, 222, $5.00.

This volume is a complete collection and analysis of all reported court decisions involving acquisition, operation, maintenance and zoning of airports, together with an analysis of Federal, state and local legislation in the airport field. The air space rights of landowners, aviators and airport operators are analyzed in the light of applicable legislation and legal principles. Designed as a legal handbook for use by those interesed in all phases of aviation and the airport expansion which is bound to follow in the wake of current developments, this book is the only study yet published which collects this essential material in one compact volume.

The great technical developments of the war still leave "airports" as the keystone of all aviation, for airplanes still must take off and land. Without airports, there would be no aviation. Cities and others who acquire and operate civil airports are faced with hundreds of legal questions as a result. This volume answers many of these questions through its review of what others have done, are doing, and plan to do in the airport field. The information for this study has been collected over a period of eight years work on aviation and airport legal and legislative problems in the three fields of governmental activity: federal, state and local. By utilizing the experience here reviewed, aviators, airplane owners, airport owners, and airport operators (public or private) can avoid the mistakes of the past and build for the future upon the successful experience thus revealed.

A listing of the eight chapter headings presents a broad idea of the contents of the book: (1) Airport Acquisition; (2) Condemnation of Property for Airport Purposes; (3) Airport Leases; (4) Regulations Governing Use of Airports; (5) Taxation of Airports; (6) Damage Claims Against Airport Owners and Operators; (7) Air Space Rights of Aviators and Landowners; and (8) Airport Approach Protection—Airport Zoning.

The book reveals in a very graphic way the growth of the "law" to meet the needs of the "air age." The legislation and court decisions in the airport field are chiefly the result of civil aviation's growth in the last 20-year period with a decided emphasis on the latter part of this period. "Avigation" easements, "airport zoning," jointly-owned airports, airport districts, and other late developments in the airport field up to August 15, 1944, are discussed in this book.

Perhaps most important of all, the volume annotates court decisions and aviation and airport statutes with citations to official sources. More than 500 footnotes throughout the book give citations of court decisions, articles, official reports, books and other references on each subject discussed.

# Pre-Trial Techniques of Federal Judges

WILL SHAFROTH*

Five and a half years have passed since the adoption of the new Federal Rules of Civil Procedure, including Rule 16 giving the district judges express power to make use of pre-trial procedure. At the time of the adoption of these rules, the pre-trial conference as a formal proceeding was little known outside the cities of Detroit, Boston and Cleveland, where good use had been made of it in the state courts. A number of federal judges already, however, had been calling together the counsel in particular cases, usually at the beginning of the trial, to find out whether any agreements could be reached as to facts which need not be proved or documents the authenticity of which would be admitted. As early as 1934, Judge George McDermott of the Tenth Circuit Court of Appeals had published an article in the *Journal* of the American Judicature Society entitled "Just What Is Your Defense?" advocating an informal discussion of the case within a few days after its filing.

When the committee appointed by the Supreme Court to draft the Federal Rules of Civil Procedure set out upon its work, it was with a view to incorporating into the federal system all improvements in practice which seemed of a practical nature. I do not think there is anything in the federal rules which had not previously been tried in some state. It was natural that the state court experience in pre-trial, particularly in Detroit and Boston where it had succeeded in clearing up very bad congestion of the trial calendars, should have attracted the attention of the committee.

The wise men who drew up the federal rules did not, however, require the establishment of a compulsory pre-trial calendar. Instead, they recommended adoption of a rule which was entirely permissive in its nature and allowed each federal court to use pre-trial procedure to the extent and in the manner it saw fit. At one of the institutes held on the subject of the new procedure, Professor Sunderland, a member of the rules committee, was asked why Rule 16 was not made mandatory. His reply, characteristic of his usual good common sense, was that if the district judges didn't like the rule it wouldn't work anyway, and there was no use in making it mandatory because nothing could be accomplished without the sympathetic interest of the judge and there was no way to force him to be sympathetic.

The result has been that there is hardly a single federal judge who has not experimented to some extent with this rule. While those federal

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courts which have established a pre-trial calendar for all civil cases before they go on the trial list are still very much in the minority, the majority of our district courts use pre-trial procedure, either on the initiative of the judge himself or at the request of one of the parties.

At the suggestion of Senior Circuit Judge John J. Parker of the Fourth Circuit, a committee to study and report on pre-trial procedure was authorized by the Judicial Conference of Senior Circuit Judges at its meeting last September, and was appointed by the Chief Justice shortly afterwards. Judge Parker is the chairman, and the other members are Circuit Judge Alfred P. Murrah of the Tenth Circuit, Associate Justice Bolitha J. Laws of the District of Columbia, and District Judge Paul J. McCormick of the Southern District of California. Professor Edson R. Sunderland of the University of Michigan has been asked to act with the committee in a consultative capacity, and, as a representative of the Administrative Office, I have been designated as secretary.

The preliminary report of the committee, together with a statement by Professor Sunderland, was circulated to all federal judges and their opinion was asked concerning the questions raised in the report. The thirty-odd letters received from district judges contained many valuable comments and suggestions, and are the source material upon which the remainder of this article is based.

The first question in our preliminary report asked for the results which have been achieved by pre-trial procedure. As was to be expected, most of the judges who responded to Judge Parker's invitation to comment on the report (you will note it was not a questionnaire) were strongly in favor of pre-trial procedure, and their general opinion was that it was producing excellent results. This is not necessarily a reflection of the attitude of the entire federal bench, but I feel very confident in saying that there are few if any United States district judges who would desire to repeal the rule as long as it remains in its present form, leaving the judge the option of using the procedure if and when he chooses and permitting him to employ it in such manner as he sees fit.

The next question related to the objections raised to the use of the procedure by judges or lawyers. As far as judges go, the only objections voiced were that in some instances it was thought that no results were accomplished. In most districts where pre-trial is used, the judges report that the bar cooperates and is favorable to the rule. Individual objections on the part of attorneys sometimes arise from a reluctance on the part of counsel to show their hand before trial, a fear that they will be unduly limited in the presentation of their case on trial, or fear that the case will be prejudged or that they will be forced into a settlement.

It is apparent that these are not valid objections to pre-trial, and the way to dissipate them is to instill confidence in these attorneys by the manner in which pre-trial is conducted.

The testimony of the district judges is overwhelming that the best time for pre-trial is shortly before trial, and this means not less than one week and not more than three as an objective to be attained where possible. The reason for this is that by that time the deadline is close enough so that the parties come in to pretrial knowing what they are going to prove, what the issues are, what documents are to be introduced and knowing also that actual trial is imminent. At the same time they may not yet have called in many of the witnesses and there remains the possibility of saving much time and expense if stipulations concerning certain facts can be agreed on. Furthermore, it cannot be questioned that the possibilities of settlement are greatly enhanced as the trial day approaches.

Some judges call a conference of attorneys at the beginning of the trial itself and at that time endeavor to segregate and eliminate issues and obtain admissions regarding facts and documents. As Professor Sunderland has said, it is doubtful whether this should be considered as a true pre-trial hearing, since it fails to accomplish a major purpose contemplated by Rule 16 in reducing the burden of preparation for trial and eliminating the necessity for the attendance of witnesses to prove uncontroverted facts. I do not mean to intimate that in my opinion such attempts to shorten the trial are not valuable where a pre-trial conference well in advance of trial is not feasible, but I am convinced that where good results are accomplished by this method greater advantage would have been secured if the same proceeding had been held earlier.

One other factor is of great importance. We all know that the great majority of cases reaching issue never get to trial. When cases at issue are put on the calendar there is no knowing how many of them are going to be continued, postponed, dismissed, or otherwise go off the calendar. If pre-trial occurs within the one to three-weeks period before trials are scheduled to begin, it is possible to find out with some fair degree of certainty what cases are actually going to be tried, how much substance there is in them, and how long the trial will take. This means that a trial calendar can be set which will enable each lawyer to have a good idea of when his case will be reached and in many instances cases can be set for a day certain. The saving of time to lawyers and witnesses by such a method is highly desirable.

Now if the judges who have reported to our committee as to this timing are sound in their opinions concerning it, the question arises—is it possible or profitable to do this in a district having four to six or more places of holding court, with terms at least twice a year? In this connection the testimony of Judge Fred L. Wham of the Eastern District of Illinois is worth quoting. There are in his district four places of holding court, divided between him and Judge Lindley. Here is what he has to say:

"As you know, the Eastern District of Illinois is a rural district, and litigants and attorneys come from long distances within the district to present their cases. The attorneys live considerable distances apart and ordinarily would not see each other until the case came on for trial. To meet this situation, I usually make it a practice to set apart a day or two days about three weeks before the beginning of each term of my court on which all cases which are at issue and have not been pre-tried are set for pre-trial. In the beginning of the day I call the calendar of the cases which are ready to be set for trial and those which are set for pre-trial. As a result of the call I set all of the cases which are ready and in this way am able to get a trial calendar which the attorneys understand will be carried through as made. Immediately following the call of the calendar I begin hearing the pre-trials in chambers. Awaiting their turn, the lawyers from over the district sit out in the court room after having been invited by the court to become acquainted and to discuss their cases and the matters which can and should be disposed of in the pre-trial hearing; also to discuss settlement if either party is interested. All of this has been preceded by a letter to each attorney advising just what will be done on that day and what he should be prepared to do. The result is that the attorneys usually come into my chambers with some idea of what we can accomplish and what they want to accomplish in the pre-trial hearing. Consequently, the pre-trial hearing does not take long and is usually effective in so far as it is in a case that can be advantageously dealt with in a pre-trial hearing. As soon as the pre-trial hearing is concluded, if the case is ready for trial or will be during the succeeding term, it is put on the trial calendar with the attorneys present and they understand that it will be tried on that day unless unavoidably prevented or settled in the meantime."

Judge John W. Delehant of Nebraska, another pre-trial enthusiast, holds his pre-trials in Lincoln, a central point. He states:

"We hold relatively constant session in Lincoln and Omaha and comparatively rare sessions in six smaller divisions. As to the latter group, I have used the pre-trial conference effectively, generally by calling the conference at a time convenient to counsel and in my own chambers in Lincoln, but on at least two occasions by holding the conference in the outlying division where the trial is to be had."

Judge Frank L. Kloeb of Toledo, who sets a pre-trial calendar for all cases in which a trial notice required by the practice of that district has been filed, also finds virtue in pre-trial as an aid to establishment of a stable trial calendar. He writes:

> "I find also that I am able to discover whether there is any meat in certain cases, and obtain the opinion of counsel on both sides as to how long it will take to try each of the cases. This results in a great saving of time for the court, as cases can then be so spaced at the pre-trial conference as to conserve time and award time according to the merits involved in each case. This system, also, is very beneficial to counsel, because they are able to secure a day certain for the trial of their case, rather than to be assigned with six or eight cases for a particular week without a day certain and thus be required to be ready for court during that entire week."

I think we are entitled to list this feature of winnowing the wheat from the chaff and developing a firm calendar of cases for trial as a major advantage of pre-trial in any district. The extent to which judges use it for that purpose will, of course, depend upon their own enthusiasm for the rule and upon their own individual calendar practices, which are as many and as varied as the colors in Joseph's coat.

While it is true that pre-trial procedure can be used in any type of civil case, its effectiveness may differ in different kinds of actions and it may vary greatly even as between actions of the same kind, depending on the complexity of the case, the nature of the issues, and the kind of testimony which will be needed to sustain them. Where there are rules requiring every case at issue to be put on the pre-trial calendar, usually no exceptions are made. In the District of Columbia, where the federal court also has local jurisdiction, divorce cases, a certain type of patent case under Section 4915 of the Revised Statutes, which amounts to an appeal from the Patent Office, and veterans' insurance cases, which are investigated by a special court commissioner, are excluded. Most of the judges who are pre-trial advocates, however, feel that the procedure can be used advantageously in any kind of civil case. The committee in its preliminary report mentioned forfeiture and habeas corpus cases as types in which a conference might not be particularly useful, but at least one judge thought both of those should be included.

Cases involving negligence, breach of contract, condemnation where a large number of tracts are involved, wage and hour cases, and insurance were frequently listed. Judge W. Calvin Chesnut of Maryland makes particular mention of long cases and situations where there are a series of cases involving a common critical issue of law or all growing out of one related series of facts and where there are different counsel in the several cases. He further states it as his opinion that it is the nature of the evidence to be produced in the particular case rather than the classification of the type of action that should be controlling.

Judge Bower Broaddus of Oklahoma, who has pre-tried all his civil cases for four years, says:

"Pre-trial hearings may be held advantageously in cases arising from torts, contracts, real properties, war risk insurance, condemnation, anti-trust laws, Fair Labor Standards Act, and rate schedules.

"In the land condemnation cases special values often have been involved—such as the value of the land for oil and gas, lead and zinc, rock and other purposes. When special values have been involved, that fact has been determined and the number of expert witnesses limited. Where a portion only of a tract has been taken, the question of severance damage has been considered, and fully outlined at the hearing. At the conclusion of the pre-trial conference, counsel for the litigants knew the special values to be considered and the legal questions in dispute. This prevented surprise upon the trial. Guarding against surprise was of importance in those cases tried before a jury."

As to the use of pre-trial in criminal cases, there is a very considerable difference of opinion. It is not widely used at the present time, and some judges feel that the pressure which can be put on a defendant even in a "voluntary" proceeding is highly undesirable and "somewhat dangerous in its constitutional impact." This again gets back to the manner in which it is used, and I assume that none of us would favor its employment to urge the defendant either to plead guilty or to make admissions against his interest.

However, I call attention to a letter from Judge Paul C. Leahy of Delaware, in reference to the Mantle Club mail fraud conspiracy case which he tried last year.

"In January, 1943, I was about to commence the trial of a criminal case involving seventeen defendants, wherein it was estimated that the case would take seven months to try. While there was no judicial or statutory authority for calling a pre-trial conference in a criminal matter, I nevertheless called the attorneys for the government and the defense into chambers and asked if they wished to cooperate. In the particular case in question we had approximately 6,700 exhibits. With the exception of about a dozen particular writings the parties had agreed on authenticity and materiality before the trial commenced. I shall not detail other matters that were stipulated prior to trial. The point is that we cut the trial down to four months. I am informed that there is a considerable opinion among federal judges which is opposed to pre-trial in criminal matters, but I cannot share this view."

This is the exceptional type of criminal case where much can be accomplished in pre-trial. Since there are particular instances where criminal pre-trials may be of great value, is the Criminal Rules Committee

not justified in advocating inclusion of a rule on the subject, leaving its use to the sound discretion of the individual judge?

There would seem to be little scope for pre-trial in appellate proceedings and no need for any rule regarding it, but where an appellate court wishes to call counsel together for a particular reason in advance of argument, I see no reason why it should not do so.

Rule 16 set out the main subjects to be discussed at the pre-trial conference, including the simplification of the issues, amendment of the pleadings, admissions of fact and stipulations as to the admission of documents subject to objection at the trial as to relevancy, and in some cases the limitation of expert witnesses. Where special verdicts are used, the questions to be asked of the jury may be framed if counsel can agree on them, although some judges think this will usually have to be done after the evidence is in.

Then there is the question of settlement, which is not specifically mentioned in Rule 16. It cannot be doubted that it is a great saving of time to court, counsel and litigants to settle lawsuits instead of trying them. Any procedure which does this without infringing on the fundamental rights of the parties is performing valuable service. Pre-trial made its initial reputation in Detroit and Boston through its ability to secure settlements. It is the opinion of the judges in the District of Columbia that it has been very effective there in that direction.

In those courts, however, the pre-trial judge does not try the case. His expressed opinion as to the strength or weakness of one side or the other cannot be thought to be a bias of the trial judge which has doomed that party's chances in the lawsuit. In view of the fact that federal districts where the pre-trial judge does not try the case are very few, the committee has asked, "To what extent should settlement be discussed by the pre-trial judge?"

It may be stated with a good deal of certainty that the committee has no intention of seeking to have a mandatory rule prescribed on this subject. This will be left up to the district judges, but here again the opinions of the judges expressed to the committee are valuable. In general the opinion is that it is proper for the judge to ask the parties whether settlement has been discussed. This opens the subject up and there are many judges who will not go further without the request of the parties. I quote five district judges on this subject.

Judge Shackelford Miller, Jr., of the Western District of Kentucky:

> "I find that very often attorneys strongly object to efforts on the part of the court to bring about a settlement, and while appropriate suggestions might be made at times, yet I do not like to emphasize that feature. I believe that an attorney is very apt to get

the impression that you have prejudged his case and are unsympathetic to his position, with resulting dissatisfaction in the way in which the case is terminated. A large percentage of cases set for trial in this district are actually settled before trial without pre-trial conferences or suggestions to that effect by the trial judge, and I have found very little reluctance on the part of attorneys to discuss such a question among themselves. On the other hand, a pre-trial hearing often discloses to counsel a real weakness in his case and naturally leads to negotiations for a settlement and possible settlement without it being necessary for the judge to suggest it or urge it. This is no doubt a valuable by-product of pre-trial procedure."

Judge W. Calvin Chesnut, of the District of Maryland:

"In my view, this should be left to counsel to take the initiative. I think the case should be exceptional in which the trial judge should initiate the discussion of a possible settlement. When there is a very congested court docket and it is obvious that the case, such as many negligence cases, involves amount rather than liability, it is certainly not inappropriate for the trial judge himself to suggest that counsel consider settlement."

Judge J. Waties Waring, of the Eastern District of South Carolina:

"I think that no judge should force a settlement and use or misuse his power to force a settlement by stating what he will do in regard to direction of verdict. On the other hand, I think it clearly within the province of the trial judge to suggest to the attorneys that there may be some common ground for discussion and state to them that they might try to have a meeting of their minds. He has an opportunity to suggest this if he has resolved certain doubts, misunderstandings or issues and brought the case down to a narrow compass. I think a judge might sometimes go further and where he sees that one of the parties is probably interposing sham or frivolous matter, that he might state to the attorney that if the matter is substantial of course it should go to trial, but if it is found that claims or defenses are without any foundation that Rules 36 and 37 may be invoked."

Judge Fred M. Raymond, of the Western District of Michigan:

"Because of drastic criticism of pre-trial conferences in which the judge is alleged to have endeavored to force settlements, I have been very careful to do no more than open the subject to discussion among counsel, without projecting my own views. A judge can easily disqualify himself (at least in the minds of parties or their attorneys) by participating too strongly in efforts to bring about a settlement."

Judge John W. Delehant, of the District of Nebraska:

"To what extent should settlement be discussed by the pre-trial judge? Certainly not to such an extent as to amount to coercion or actual moral pressure. But, that having been said, it seems appropriate to add that the judge ought not to disdain to bring the subject of settlement to the attention of counsel during pre-trial conference in any case which may appropriately be settled.

"In practice, under the final paragraph of the rule, I almost invariably close my own participation in the conference by an inquiry in something after the following fashion: 'Finally, gentlemen, have you explored the possibility of the mutual adjustment of your case?' If the answer is negative, it is followed by a second inquiry as to whether counsel think that subject may profitably be considered. Unless the answer to this further question is also negative, I quite uniformly suggest that the facilities of the court chambers and the attorneys' consultation room are available for conference between counsel upon the subject of adjustment, and that it is the general policy of the court to encourage such efforts.

"Beyond that, I do not go; and I definitely insist on remaining away from any conferences between counsel upon the subject of settlement, or participating in any way in the further discussion of this question. Lately, in cases triable to juries, I have occasionally presumed to remind counsel of the practical difficulty and injustice that is involved in assembling and retaining juries in the present crisis, and intimated that they may not unwisely consider that factor in approaching the problem of settlement."

The committee has stated its opinion to be that settlements are a useful by-product of pre-trial procedure and they will result in many cases after the strength and weakness of each side becomes apparent at the conference without pressure from the judge. The answers received tend to fortify this position. Of course, where there is a separate pre-trial judge, many strictures upon the free expression of his opinion concerning the case are not applicable.

About two judges out of three prefer to conduct pre-trial proceedings in chambers because of the greater informality of the atmosphere. Judge Broaddus of Oklahoma is an advocate of hearings in open court for these reasons:

"Pre-trial hearings should be conducted in court. When so held, the attorneys and the judge proceed toward the business at hand and omit personal matters and discussions having no bearing upon the case or cases being considered. The hearing in the court room permits other counsel to be present and to witness the method of procedure, and thereby be better prepared to conduct the hearing

of the case in which such counsel may be interested. The court room hearing should be beneficial in promoting the use and effectiveness of pre-trial hearings."

Some judges examine the pleadings before pre-trial; others do not. Some difference may be warranted, as suggested by Judge Chesnut, between situations where a conference is requested by the attorneys and instances where there is a regular pre-trial calendar. In the latter case, he feels the judge should familiarize himself with the pleadings.

Several judges felt that to require advance preparation by the lawyers of a written statement of the case or written stipulations which they desired should be entered into would give the proceedings a formal cast which they wished to avoid. Of course, the lawyers are expected to be ready to discuss their cases, to know what their evidence at the trial will be, and to have in mind the stipulations they want.

Usually only the lawyers who are to try the case are present at pre-trial, but if they desire to bring their clients with them, that is permitted by most courts. Witnesses, too, are sometimes present, but this would seem to be unnecessary in the usual circumstances.

Reporters are now used in very few courts and most judges feel that their presence would put an effective damper on full and frank discussion of the case if a transcript of the proceedings was to be made. However, the value of drawing the pre-trial order and stipulations agreed to by counsel in their presence before the conference adjourns is worthy of consideration. A secretary or stenographer may be used for this purpose but it is quite likely that, when, as and if official salaried reporters become available under the new act, they may be used for this purpose, but not for taking down the conference proceedings.

Rule 16 provides that the court shall make an order setting forth the action taken at the pre-trial conference, the agreements reached, and other pertinent facts. A main purpose of this order is to assist the trial judge in holding down the trial to the actual issues which the parties have agreed on at the conference.

It appears, however, that often where the conference is of a very informal character, it has been considered unnecessary to enter such an order and the parties have either been asked to draw up and file written stipulations embodying the agreements arrived at or have gone to trial without such agreements having been written out at all.

The danger of this practice would seem to be not in the reliance it places on the good faith of counsel but rather in the danger of misunderstanding or forgetfulness as to the exact agreement reached.

A very usual practice is for the pre-trial judge to dictate an order at the close of the conference in the presence of counsel, with the privilege

on their part to object to any part of it which does not accord with their understanding. In the District of Columbia the order is dictated to a typist in the courtroom and is initialed by counsel before they leave the conference. On the other hand, Judge Delehant, of Nebraska, prepares the pre-trial order himself but gives the attorneys no chance to object to it at the conference. Copies are afterwards supplied to them and they have the right to file objections, in default of which the order becomes final. In still other jurisdictions the transcript of agreements reached and of the issues in their streamlined form, as developed at the conference, is itself considered as a pre-trial order which guides the course of the trial.

No doubt is expressed by any judge as to the binding force of the pre-trial order in controlling subsequent proceedings, but there is often a saving statement that plain errors can be corrected. It seems to me this is adequately covered in the rule where it says:

> "Such order when entered controls the subsequent course of the action unless modified at the trial to prevent manifest injustice."

In reference to sanctions for enforcing the attendance of the attorneys at the pre-trial conference, this is an incident of pre-trial procedure which seems to have caused no difficulty. Judge Francis J. W. Ford, of Massachusetts, calls attention to the form of notice of the conferences used by his court which provides that non-suits or defaults may be entered at the time of the conference. He states that it is rarely necessary to enter such orders.

As to the use of summary judgment and discovery at the pre-trial conference, there is an evident disposition on the part of district judges to proceed with caution. Judge Lewis B. Schwellenbach, of the Eastern District of Washington, believes that pre-trial should not be used to avoid the requirements of the discovery and summary judgment rules without full consent of the parties, and adds that this will help to create confidence in the bar in pre-trial procedure.

On the other hand, Judge Broaddus, of Oklahoma, and Judge Wham, of Illinois, feel that the court should have the power to enter any order which would promote or expedite discovery under the rules. This appears reasonable to me.

As to summary judgment, it is equally reasonable that the parties should be given ample opportunity to oppose such a motion even if this means a postponement of hearing and decision to a later date.

The benefits of pre-trial are becoming known in all parts of the country. Its usefulness in clearing congested dockets has been widely advertised, and justifiably so. But the letters which have been sent to Judge Parker by many district judges emphasize the value of the procedure in the non-metropolitan districts where the dockets are not heavy and there is no delay in getting to trial. Many of these judges emphasize

the virtue which lies in the flexibility of the rule and believe very strongly that this flexibility should be maintained and no formal requirements of procedure should be added to it.

It is impossible to read these enthusiastic comments of able trial judges on the value of the rule without becoming convinced that it is being effectively used to reduce the number of trials and to shorten the time of trials and lessen their expense to the parties.

In the same way that the procedure is ineffective unless the judge feels that it can be made to produce worthwhile results, pre-trial will not succeed if the bar opposes it. The lawyers must cooperate, particularly in making a full disclosure of their case at the conference and in attempting to eliminate the necessity for proof of matters which are not in dispute. The testimony of the judges is that there has been little difficulty with the lawyers on these scores when they have become convinced that the pre-trial is being fairly conducted without advantage to one side only and their cases are not being pre-judged.

There is little doubt that the use of the pre-trial conference in both state and federal courts will continue to grow as it becomes more and more evident that it is a useful procedural tool to improve the administration of justice.